The concept of punitive legislation and the Sixth Amendment: A new look at.

Kennedy v. Mendoza-Martinez†

In American courts and under the stamp of governmental administrators, individuals suffer many deprivations as onerous as confinement in prison. An alien's deportation to the long-forgotten land of his original citizenship may be as objectionable to him as a period behind bars. Equally to be feared is the involuntary loss of citizenship, which renders one susceptible to deportation and exclusion from the United States. Even the ubiquitous money judgment, when disproportionate to the defendant's ability to pay, can have more lasting consequences than a short spell in the penitentiary.

Yet in one significant respect, imprisonment stands apart from these other sanctions. Along with torture and capital punishment, imprisonment is historically the dominant social response to behavior defined and spoken of as criminal. Indeed, the common law and its codifications have customarily labelled "criminal" only those acts penalized by imprisonment, torture or death.

As well as standing at the core of the historically developed notion of criminal punishment, the sentence of imprisonment is, to the same degree, correlated with the procedural requirements surrounding the criminal process. Under the sixth amendment, as under the common law, the accused in a criminal proceeding receives more protection in the fact-finding process than his counterpart in the civil proceeding. Trial by jury, confrontation of witnesses, and representation by counsel—all are among the historic safeguards guaranteed by the sixth amendment to the accused in a federal criminal prosecution. To invoke the

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1 From Mr. Justice Brandeis' pen has come a phrase cited frequently to show that the Supreme Court acknowledges deportation as a serious sanction: "It may result . . . in loss of both property and life; or of all that makes life worth living." Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).
protections of the sixth amendment, a defendant need demonstrate only that he is subjected to a "criminal prosecution."  

It seems an easy task to determine whether a prosecution is criminal—at least, whether it is criminal in the view of the government. With federal criminal offenses created by Congress alone, one need only ask how Congress has labelled this offense. Yet permitting Congress to choose whether the accused enjoys the rights to a jury trial and to representation by counsel conflicts with the assumption that the first ten amendments were enacted to limit the powers of the federal government. In recognition of the restrictive purpose of the sixth amendment and the error of looking to congressional labels, the courts have turned to the form of sanction as the primary gauge of the criminal prosecution.

Thus in *Wong Wing v. United States*, the Supreme Court unanimously found it inconsistent with the fifth and sixth amendments for an immigration officer to commit deportable aliens to a year's confinement at hard labor. Addressing itself solely to the quality of the sanction, the Court concluded that despite congressional labels to the contrary, a sentence of imprisonment rendered the proceeding equivalent to a "criminal prosecution." Although the aliens were subject to administrative determination of their deportability, they could validly object to the administrative imposition of a year's confinement prior to deportation. To defend against being jailed, the aliens could demand the protections of a criminal trial.

Even if necessary to preserve the sixth amendment as a limitation on congressional power, the *Wong Wing* approach has its own methodological difficulty. Certainly the sanction is an important historical char-

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2 Article III, § 2, cl. 3 of the Constitution contains a supplementary provision, "The trial of all crimes . . . shall be by jury . . . ," which has been subsumed under the development of the sixth amendment. See CORWIN, THE CONSTITUTION OF THE UNITED STATES OF AMERICA 638 (1952). In the fifth amendment, two references to criminal proceedings appear, one narrower and one broader than the term "criminal prosecution" used in the sixth amendment. The narrower concept, that of the "infamous crime," is limited to offenses punishable at least by imprisonment in a state or federal penitentiary; this concept is used as the standard for the requirement of the grand jury indictment. See Mackin v. United States, 117 U.S. 348 (1885). The broader concept, that of the "criminal case" which sets the scope of the privilege against self-incrimination, extends to cases not covered by the sixth amendment. See, e.g., Lees v. United States, 150 U.S. 476 (1893) (privilege applicable in a case of a monetary fine, which would not sustain the sixth amendment). Compare Hepner v. United States, 213 U.S. 103 (1909). See also United States v. Matles, 247 F.2d 378 (2d Cir. 1957), rev'd on other grounds, 356 U.S. 256 (1958) (conviction of contempt reversed; the defendant is permitted not to take the stand in a denaturalization proceeding, even though denaturalization is not a "criminal prosecution" under the sixth amendment).

3 See CORWIN, op. cit. supra note 2, at 877.

4 163 U.S. 228 (1896).
acteristic of a criminal proceeding, but is it more indicative of a proceeding "essentially" criminal than the style of pleading, the public or private status of the plaintiff or the degree of the plaintiff's burden of proof? Apparently the Court in *Wong Wing* regarded the nature of the sanction as critical, but the Court's approach must be appraised in light of the purpose of the sixth amendment.

On its face, the purpose of the amendment appears to be the procedural protection of those subjected to criminal prosecution from hasty, mistaken applications of the substantive law. The reason for guaranteeing this extra measure of protection in criminal prosecutions seems to be a judgment that the sanctions used against convicted criminals are, on the whole, more onerous than the sanctions imposed against other defendants. But some non-criminal sanctions are as grave as some criminal sanctions, and if the purpose of the safeguards is to protect persons from mistaken imposition of grave sanctions, consistency ought to require that protection be afforded whenever a person is threatened with a grave sanction. Yet, while there can be little question that the purpose of the amendment is protective, there is room for disagreement about the extent to which protection is to be afforded: the purpose of the safeguards gives content to, but is also limited by, the phrase "criminal prosecution."

Fidelity to the history of the phrase would lead one to restrict the sixth amendment at least to proceedings in which the state threatens imprisonment, torture or death. With the amendment's purpose suggesting a broader sweep, however, the boundaries to the amendment are ever in tension. Historical factors have shaped several results which are squarely inconsistent with a policy of protecting all those faced with sanctions felt to be as grave as those customarily used against convicted criminals. Relying on tradition, the Supreme Court has recently affirmed the denial of a jury trial in a judicial contempt hearing.

5 This proposition, which is maintained throughout the comment, is concededly a simplification. The interest protected by the jury trial guarantee is more subtle than avoidance of error in application of the substantive law. No recognition is made in this analysis of the jury's role as the ultimate legislative voice of the community.

6 The provision of a jury trial has been restricted even further in certain situations. Although faced with penalties including death and imprisonment, the defendant in a court-martial proceeding may not be afforded a jury. See, e.g., Kahn v. Anderson, 255 U.S. 1 (1920); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857). This too may be attributable to tradition, since military disciplinary proceedings have not been regarded as criminal proceedings in the usual sense. There may be something more than blind adherence to the past at work here, however. Swift justice may be a greater value in the military than sure justice; if so, speed may be a countervailing policy outweighing the protective purpose of the sixth amendment.

7 United States v. Barnett, 376 U.S. 681 (1964). A footnote to the opinion suggests that the result of the case might have been different if the question had been framed.
Also, the Court has sustained the exemption of imprisonment for "petty offenses" from the amendment's scope; again the dominant perspective was historical practice.

In one respect, however, the policy of the amendment has clearly had the upper hand. To fashion a test for the type of sanction covered by the amendment, the Supreme Court has relied on the term "punishment"—a concept that captures more the function and less the form of the traditional criminal sanction. Stressing the punitive function of imprisonment, this test provides an avenue for other sanctions, functioning in the same way, to come within the shelter of the amendment. Through identification with the concept of punishment, the amendment has become capable of facile expansion in the direction of protecting all those threatened with deprivations felt to be as serious as a term in jail.

Yet, despite the emergence of the term "punishment" as the test for its application, the sixth amendment's central concept, the "criminal prosecution," has adhered tenaciously to its historical origins. That the amendment extends to deportation proceedings has been frequently argued and as frequently rejected, each time with a disregard for reason that is characteristic of arguments drawing on the force of history. Also, it has repeatedly been advanced in the Supreme Court that statutorily imposed fines could not be collected without the procedural guarantees of the sixth amendment. Not once has the Court agreed. Though the Court has concluded that particular fines were punitive in the context of other constitutional issues, it has never held that a fine, even differently. "However, our cases have indicated that, irrespective of the severity of the offense, the severity of the penalty imposed, a matter not raised in this certification, might entitle a defendant to the benefit of a jury trial. . . . In view of the impending contempt hearing, effective administration of justice requires that this dictum be added: Some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." 376 U.S. at 688 n.12. (Emphasis added.)


9 See Fong Yue Ting v. United States, 149 U.S. 698 (1898); Helvering v. Mitchell, 308 U.S. 591 (1938).

10 The landmark decision, Fong Yue Ting v. United States, supra note 9, has foreclosed debate whether deportation is a "criminal prosecution." The Fong Yue Ting decision also influenced the holdings in Harisiades v. Shaughnessy, 342 U.S. 580 (1952) and Galvan v. Press, 347 U.S. 522 (1954) that deportation is not punitive in the sense necessary for application of the ex post facto clause.

though designed as a deterrent and collected by the government, was punishment in terms of the sixth amendment. Indeed with one recent dramatic exception, the Supreme Court has never endorsed expansion of the sixth amendment beyond the historically defined criminal sanctions of imprisonment, torture and death.

That sole exception came in the 1962 decision of *Kennedy v. Mendoza-Martinez*. The appellee, a native-born citizen, had challenged the constitutionality of his involuntary expatriation under section 401(j) of the Nationality Act of 1940, which provided for the involuntary expatriation of all those who left the country to evade the draft in time of war. In affirming the district court's conclusion that the statute was unconstitutional, the Court held, five votes to four, that expatriation under section 401(j) was punitive in the sense required for the application of the sixth amendment. Without the proper procedural safeguards, the statutory scheme for expatriation failed to meet constitutional standards.

One could look at the Court's unorthodox decision in *Mendoza-Martinez* as the sign of a new stance toward the sixth amendment, as a portent of further extension beyond the historically defined scope of the "criminal prosecution." But if this view is correct, it should find

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12 The Court's findings of punitive sanctions fall into two broad categories: (1) statutory interpretation, as in *Helwig v. United States*, 188 U.S. 605 (1903) (interpretation of a statute denying jurisdiction to circuit courts over collection of "penalties and forfeitures"); *La Franca v. United States*, 282 U.S. 568 (1931) (interpretation of concept of prior "prosecution" under § 5 of the Willis Campbell Act, 42 Stat. 223 (1921), which barred assessment under the Volstead Act, 41 Stat. 205 (1919), after a prosecution for the same acts); *Lipke v. Lederer*, 259 U.S. 557 (1922) (interpretation of Volstead Act to require a hearing for assessments upon violation of the act). In these latter two cases, the Court did mention the constitutional problems that would arise upon a contrary reading of the statutes in question; in *La Franca*, under the double jeopardy clause; in *Lipke*, under the due process clause of the fifth amendment. Neither case contains an earnest consideration of the proposition that the fine was tantamount to a "criminal prosecution" under the sixth amendment. (2) the constitutional scope of Congress' taxing power, U.S. Const. art. I, § 8, cl. 1, as discussed in *Constantine v. United States*, 296 U.S. 287 (1935); *Child Labor Tax Case*, 259 U.S. 20 (1922).

13 372 U.S. 144 (1963). The Court's opinions regretfully do not acknowledge the path-breaking significance of the case. The majority opinion written by Mr. Justice Goldberg treats the rationale under the sixth amendment as an outgrowth of Supreme Court litigation on the concept of punishment. Yet in none of the cases cited by the majority does the Court seriously consider the application of the sixth amendment. 372 U.S. at 168-69.


support in the reasoning of the opinions as well as in the formal constitutional conclusion.

Doubts as to the Court's disposition to expand the sixth amendment arise upon reading the critical arguments on the issue of punishment. Mr. Justice Goldberg, writing for a five-man majority, felt section 401(j) was rendered punitive by Congress' intent to punish wartime draft evaders who leave the country. The argument assumes, almost as though the point were too elementary for discussion, that if Congress enacts a statute with a punitive intent the sanction thus imposed is punishment. But the transition from Congress' intent to the constitutional quality of the sanction is not that obvious. The argument needs examination, especially in its relation to the assumption that the purpose of the sixth amendment is to protect defendants against the mistaken application of especially grave sanctions.

In its form, Mr. Justice Goldberg's rationale has the appealing ring of the classic syllogism on statutory interpretation. To say that if Congress intended to punish, the sanction thus inflicted is punishment, is very much like saying that if Congress intended to create an article III court, the court thus created is an article III court. But the argument's form is astoundingly deceptive. Mr. Justice Goldberg does not purport to make an argument on the meaning of section 401(j); there was no dispute about what the statute said. The question was not whether Congress intended that expatriation under section 401(j) be regarded as tantamount to a criminal prosecution. If that were Congress' intent, which it indisputably was not, the case could have been resolved without recourse to the constitutional issues. If Congress had wished that draft evaders suffer expatriation under section 401(j) only after conviction by criminal process, the decision in Mendoza-Martinez would have been clear: in not having been tried and convicted, Mendoza would not have lost his citizenship. But the statutory plan clearly envisaged expatriation without the procedures specified in the sixth amendment. Invoking the concept of "congressional intent," Mr. Justice Goldberg addressed himself to a problem wholly different from the question of Congress' meaning in using the language of the statute.

But if the concept of "intent to punish" is not related to the question of statutory meaning, it is not immediately clear what type of "intent" forms the cornerstone of Mr. Justice Goldberg's thesis. To begin an interpretation of the concept, one must look to the arguments used by Mr. Justice Goldberg to prove that Congress had this curious form of

16 Though writing a separate opinion, Mr. Justice Brennan formally joined the opinion of Justices Goldberg, Black, and Douglas and the Chief Justice. 372 U.S. at 187.
17 372 U.S. at 167.
Strictly speaking, however, the majority does not introduce the linguistic habit of legislators to show that section 401(j) was a punitive sanction. Though it appears to use the cases under the old statutes directly on the issue of punishment, the opinion relates its survey of congressional history to the preliminary issue of Congress' "intent to punish" in enacting section 401(j). Therefore, one can surmise that so far as this first argument goes, the congressional "intent to punish" consists of the legislators' practice of referring to their activity as one which imposes punishment. But why one should be concerned about the lay linguistic habits of congressmen is far from clear. As we have shown, the issue is not one of determining what Congress meant in using the language that it did, but rather whether the defendant is threatened with punishment. The majority opinion fails to offer guidelines or even a motivating reason for its use of legislative history in a way other than for clarification of the statutory language.

The majority's devotion to the evolution of the statutory sanctions against draft evaders is best taken as a prelude to its analysis of expatriation under section 401(j) of the amended 1940 Nationality Act. In approaching the current statute, however, the majority focuses more on the issues of punishment than on the factor of Congress' intent to punish. At this stage of the opinion, Mr. Justice Goldberg permits subtle merging of the premise and of the conclusion, of the intent to punish and the concept of punishment.

In its second foray to prove that the sanction is punitive, the majority turns away from the label used in the legislative background, and toward the practical aim of Congress in levying the sanction. Examining the circumstances that prompted enactment of the sanction in 1944, Mr. Justice Goldberg finds an absence of congressional concern for the societal good to follow from denationalizing draft evaders hiding abroad.22 In the view of the majority, section 401(j) was enacted for no affirmative social purpose, but only for retribution and deterrence of draft evasion. From this conclusion the majority infers both the "intent to punish" and the fact of punishment. Under the majority's concept of social purpose, the sanction itself must promote the common good; it is not enough that the sanction achieve a desirable goal through deterrence of the conduct against which it is used.

Mr. Justice Stewart, speaking for the four votes in dissent, assents entirely to the structure of argument outlined by Mr. Justice Goldberg's opinion. Agreeing that the issue is whether the sanction is punitive, agreeing also that the gauge of punishment is whether the sanction furthers a societal goal, the dissent departs from the majority only at the

22 See 372 U.S. at 180-84.
intent. To prove his claim, Mr. Justice Goldberg deploys two wholly unrelated types of evidence. First, he engages in an elaborate survey of prior legislation affecting the citizenship rights of draft evaders. Beginning with the Act of 1865, which pertained only to the "rights of citizenship," the opinion traces the evolution of the statutory sanction through its amendment, repeal and reenactment in 1944 as an additional form of involuntary expatriation. In this discussion of the predecessor statutes, attention is directed exclusively to the linguistic habits of Senators and Congressmen in describing the sanction of depriving draft evaders of their citizenship rights. The historical survey is replete with instances in which the legislators, for one reason or another, referred to the sanction as punitive. A number of voices are heard on the question whether the Act of 1865, because it applied to those then evading the draft, violated the limitation of the ex post facto clause on congressional legislation. For assuming that the sanction was punitive in the context of ex post facto analysis, all these spokesmen are credited with saying that the sanction was punitive in a sense relevant for application of the sixth amendment. Others are heard who, in denouncing the sanction, refer to it rhetorically as punishment. Still others label the sanction punitive in making the claim that the statute, as one imposing a penalty, ought to be strictly construed. Amidst this congressional potpourri of common terms and cross purposes, not one voice emerges for the view that the sanction is punitive in a sense relevant for application of the sixth amendment. Also, among the cases construing the prior statutes, many refer to the action against draft evaders as a punitive sanction. But not one case reveals earnest consideration of the proposition so clear to the Mendoza majority: that all punitive sanctions, no matter the sense in which they are punitive, are equivalent to criminal prosecutions under the sixth amendment.

21 In Huber v. Reilly, 53 Pa. 112 (1866), a case that figures prominently in Mr. Justice Goldberg's exposition, the Pennsylvania court held that under the Act of 1865, loss of citizenship rights could be imposed only after court-martial conviction. Bolstering its reading of the statute by reference to constitutional problems arising from a contrary reading, the court mentions the sixth amendment in passing. One can hardly say, as would the majority in Mendoza, that the Huber court seriously considered the conclusion reached in Mendoza: that the deprivation of citizenship (citizenship rights in Huber) renders a proceeding tantamount to a "criminal prosecution."
last stage of analysis: on the question whether the sanction was in fact designed to promote a societal goal. The dissenting opinion builds on the finding that expatriation under section 401(j) was rationally designed to combat the deterioration of troop morale caused by unsanctioned evasions of the draft. By not allowing draft evaders living abroad to profit from their disloyalty, Congress "could reasonably have concluded," says the dissent, that the sanction of expatriation was necessary to preserve the commitment of the boys reluctantly doing their duty to country.

Thus the issue is joined. The majority and the dissent diverge on a single point: Did the enactment of section 401(j) have a purpose other than retribution and deterrence? In taking opposing positions on this central question, the majority and dissent disagree not so much on the content as on the relevance of legislative history. The dissent stresses the range of reasonable purposes that might have concerned Congress in enacting the statute; the majority favors the actual record, what in fact did concern Congress. The majority rejects the dissent's argument in one sentence: "There was no reference [in Attorney General Biddle's letter recommending the legislation] ... to any improvement in soldier morale or in the conduct of the war generally that would be gained by passage of the statute."\(^2\)

In his separate opinion, Mr. Justice Brennan challenges the relevance of the dissent's argument that the purpose of expatriation under section 401(j) was to preserve troop morale. Even if Congress had such a purpose, the sanction would be punitive:

To my mind that would be "punishment" in the purest sense; it would be naked vengeance. Such an exaction of retribution would not lose that quality because it was undertaken to maintain morale.\(^2^4\)

Thus Mr. Justice Brennan reflects a greater willingness to evaluate congressional motives in analyzing this issue of punishment.\(^2^5\)

\(^2^3\) Id. at 182.
\(^2^4\) Id. at 189.
\(^2^5\) Mr. Justice Brennan's view on the concept of punishment is complicated by his nonadherence to the standard of punishment endorsed by the other eight members of the Court. Writing the dissenting opinion in Fleming v. Nestor, 363 U.S. 603 (1960), in which the Court upheld the congressional denial of Social Security benefits to a subclass of all deportable aliens, Mr. Justice Brennan deemed the denial punitive for purposes of the bill of attainder clause solely because a subclass had been designated for especially harsh treatment. The same theory reappears in Mr. Justice Brennan's concurrence in Mendoza-Martinez, 372 U.S. at 196, to meet the dissent's point that expatriation could be conditioned on especially disloyal behavior. Brennan perceives an analogy between selecting a subclass from all deported aliens and choosing a subclass from all disloyal persons, the selection in each case rendering the sanction punitive. Compare the unrelated approach to the concept of punishment in Brennan's
In examining the logical structure of the three opinions, our end concern is with the significance of the Mendoza-Martinez decision as a harbinger of further expansion of the sixth amendment. In the direction of that inquiry, we have isolated the central disagreement between the majority and the dissenting opinions. As discussed above, the central determination of the majority opinion is that section 401(j) was enacted with no purpose other than deterrence and disapproval of draft evasion. From this judgment of no social purpose, the majority reasons that the purpose was punitive, that the sanction was punishment and that, accordingly, the imposition of the sanction required the procedural protection of the sixth amendment. In reaching the core of the majority’s argument and the point of its divergence with the dissent, it is proper to ask a question that is embarrassingly elementary: Does the presence or absence of a social purpose relate to the interest protected by the sixth amendment? The impact of the sanction is the same whether Congress is spiteful or is genuinely motivated by the common good. The question is whether the defendant’s interest in accurate determinations of fact derives from the traditional gravity of criminal sanctions or from the motives of the state in deploying these sanctions. To be fair to the defendant it makes sense to demand that as the stakes get higher, the state should accord the defendant greater protection against mistakes. On the other hand, it is hard to see how the defendant’s claim to protection could relate to the motivation of the legislature in enacting the statute. To one faced with the threat of a grave sanction, it is wholly immaterial what social good may follow the use of the sanction. If the amendment is designed to protect individuals, then the relevant criteria in construing the amendment should be the concerns of individuals threatened with criminal sanctions. The state’s good motivation is not one of these concerns, but the gravity of the sanction surely is.

In their devotion to the issue of legislative motivation, the Supreme Court’s concerns are askew with the values of the sixth amendment. Only the magic of the term “punishment” enables the Court to pass from its examination of legislative motives to the conclusion on the sixth amendment. And rather than take the Court to task for the novel stance toward why criminal defendants merit procedural protection, the dissent accommodatingly joins issues on whether Congress’ motivation should be regarded as purposeful or not; no one suggests that this approach to the concurrence in Trop v. Dulles, 356 U.S. 86, 104-114 (1958), in which the Justice readily concludes that the sanction is punitive and then inquires whether, as a punitive sanction, it rationally implements the nonretributive purposes of the criminal law. The complete exposition of Mr. Justice Brennan’s influential role in the debate on expatriation is yet to be made.
sixth amendment might be wholly inapposite. Satisfied to disagree only as far as they do, both sides accept the same standard on the issue of punishment. Both sides are willing to limit discussion to whether the sanction has a useful, practical social purpose.

The bedeviling question about Mendoza-Martinez is why the Court was drawn to a seemingly inappropriate standard on the issue of punishment. The answer may be revealed by an examination of the other constitutional issue in the case that required an evaluation of legislative purpose—the issue of Congress' authority to use expatriation as a sanction. Fully briefed and argued before the Court, the issue of congressional authority to enact section 401(j) appeared to be the dominant issue in Mendoza-Martinez. Its prominence stems from two 1956 expatriation decisions in which the Court, splintered into four doctrinal positions, concentrated exclusively on that issue. These 1956 decisions indicate that Mendoza-Martinez should be read from the perspective of the Court's doubts about congressional authority.

In Perez v. Brownell and Trop v. Dulles, the Supreme Court heard challenges to the constitutionality of provisions of the Nationality Act of 1940, which conditioned expatriation respectively on the act of voting in a foreign election and on a court-martial conviction for wartime desertion. Writing in Perez for the only coalescence of five votes in the two cases, Mr. Justice Frankfurter reasoned that expatriation of citizens voting in foreign elections was a necessary and proper exercise of Congress' power (inherent though it may be) to regulate foreign affairs. The essential point in justifying Congress' use of expatriation as a tool of policy was the relation between the problem felt to be generated by citizens voting abroad and the consequences of expatriation. The problem the Court perceived in citizens' voting abroad was the embroilment of the United States in the internal politics of foreign countries. Expatriation, by ending the connection between the voter and the United States, would thus remedy the problem by preventing involvement of the United States. This is an unequivocal example of the type of sanction regarded as non-punitive by the plurality as well as the dissent in Mendoza-Martinez. It is the paradigm for the legislative use of expatriation in the interests of a social purpose.

By causing the five-man Perez majority to splinter, the problem raised in Trop v. Dulles induced a refinement and a revision of Mr. Justice Frankfurter's theory that Congress could utilize expatriation as a necessary and proper measure to implement its existing powers. Trop produced five votes in favor of the unconstitutionality of a statute condition-

ing expatriation on a court-martial conviction for wartime desertion. Among these was Mr. Justice Brennan, who broke from the five-man Perez majority, yet used the Perez theory to support his conclusion that expatriation for wartime desertion was outside the scope of congressional authority. Because, Mr. Justice Brennan argued, the sanction itself did not induce a result within the province of legitimate congressional concern, the sanction was beyond the reach of Congress. The other four votes from the Perez majority rallied to Mr. Justice Frankfurter's dissent, which introduced a more flexible version of the theory that the sanction itself had to promote a consequence identifiable with the constitutionally prescribed aims of Congress. To uphold the expatriation of deserters as a proper exercise of Congress' power to provide for the common defense, Mr. Justice Frankfurter made a variety of points. The Justice noted that "Congress may deal severely with the problem of desertion from the armed forces in wartime," and that there is a rational nexus between refusal to perform this ultimate duty of American citizenship and legislative withdrawal of that citizenship. He even made the point that was to become so prominent in the Mendoza dissent, that Congress could reasonably have enacted the sanction in the interest of maintaining troop morale. Amidst these diffuse arguments, Mr. Justice Frankfurter never reiterates the central point of the Perez majority: that the use of expatriation as a sanction is constitutional only if it yields a result directly—not through deterrence—that is within the sphere of purposes permitted to Congress. So far as it takes a clear position, the dissent in Trop embraces the view, later adopted by the dissent in Mendoza-Martinez, that the necessary connection between expatriation and the delegated powers could derive from the deterrent effect of threatening expatriation. Thus, in the dissent's flexible perspective, the purpose to suppress wartime desertion would be sufficient to enable Congress to use expatriation in implementing its power to provide for the common defense.

Of the four Justices dissenting in Perez, the three now on the Court—Justices Black and Douglas and the Chief Justice—have never accepted the theory that expatriation legislation is sustainable under the necessary and proper clause of article I. In Perez these three maintained the courageous proposition that Congress had absolutely no power to deprive an individual of his citizenship; the most Congress could do would be to prescribe conditions "that may rationally be said to constitute an abandonment of citizenship." Accepting the precedent value of the majority position in Perez, the Chief Justice shifted doctrinal bases in

28 376 U.S. at 121.
29 Id. at 122.
30 Ibid.
formulating a rationale for the plurality—the same three plus Mr. Justice Whittaker—that joined Mr. Justice Brennan in declaring unconstitutional the expatriation of wartime military deserters. It would no longer do to argue that Congress had absolutely no power to impose involuntary expatriation, for that would conflict with the holding in 
Perez. To accept 
Perez as a precedent and yet not to subscribe to the theory of its majority, the plurality led by the Chief Justice devised a distinct rationale for invalidating the use of expatriation against wartime deserters. Rather than argue that Congress had no power over expatriation (which was rejected in 
Perez) or that this particular use of expatriation fell beyond the scope of the necessary and proper clause (which would be to accept the standard of 
Perez), the plurality invoked one of the specific limitations on the power granted to Congress under article I: expatriation of wartime deserters violates the cruel and unusual punishment clause of the eighth amendment. Part of the doctrinal construction in invoking the eighth amendment was the conclusion that the sanction constituted punishment. To the theory of punishment devised by the 
Trop plurality, we shall eventually return.

To summarize, the two 1956 decisions yielded four fully developed theories of congressional powers over expatriation. There were two forms of reliance on the necessary and proper clause—that of Mr. Justice Brennan and that of Mr. Justice Frankfurter in his 
Trop dissent. There were the two doctrinal assertions of Justices Black and Douglas and the Chief Justice: the denial of all power over involuntary expatriation and the use of the eighth amendment to deny that power in a particular case. With this backdrop of unresolved debate, which was made even more uncertain by the arrival of Justices White and Goldberg to the Court, it was expected that the issue of congressional authority would dominate the Court's attention in 
Mendoza-Martinez. It was the constitutional issue on which the briefs fastened their rhetorical power. It was the issue on which the district court below had found section 401(j) unconstitutional. Yet it may have been an issue too difficult for disposition by the Supreme Court. Against the backdrop of the fractured 1956 decisions and the arrival of two Justices to the Court, the majority turned away from the issue of congressional authority, an issue perhaps too controversial for five, or even four, Justices to unite. Instead the Court addressed itself to a problem not argued before it, the problem of procedural adequacy under the sixth amendment.

Written against the background of the 
Perez and 
Trop decisions as well as against the arguments immediately before the Court, the opinions in 
Mendoza-Martinez tend to reflect more sensitivity to the problem of congressional authority than to the values of the sixth amendment. Sev-
eral strong clues prompt this unorthodox suggestion. Foremost among these clues is the structure of Mr. Justice Stewart's opinion for the four votes in dissent. Favoring the constitutionality of section 401(j), the dissent needed to vindicate Congress' authority to expatriate wartime draft evaders hiding abroad as well as to sustain the imposition of the sanction without the procedural guarantees of the sixth amendment. In these two seemingly disparate channels of constitutional justification, the dissent relies on arguments that are nearly identical. Having argued that the sanction was not punitive because Congress could reasonably have believed that expatriating draft evaders would bolster troop morale, Mr. Justice Stewart deploys the same point to argue that the enactment of section 401(j) was a necessary and proper exercise of Congress' war powers and, accordingly, within the authority delegated to Congress under article I. By using the same argument under ostensibly different issues, the dissent suggests that the values underlying the two doctrinal disputes are the same.

Further comparison of the *Trop* and *Mendoza* opinions suggests that the majority as well as the dissent in *Mendoza* tends to regard the issue of punishment as synonymous with the issue of congressional authority. Though with different doctrinal implications, the *Mendoza* opinions ask the same question as did Mr. Justice Brennan in *Trop*: does the use of expatriation as a sanction have a purpose other than retribution and deterrence? For Mr. Justice Brennan, an additional condition is present. Not any purpose other than retribution and deterrence would do; the purpose must conform to the legislative objectives prescribed by article I as well. Yet for both doctrinal conclusions—that the sanction is punitive and that it violates the restraints of article I—an indispensable condition was the finding that the sole purposes of the sanction were retribution and deterrence. Thus when the majority behind Mr. Justice Goldberg argues that section 401(j) is a punitive sanction, it is arguing to a conclusion that encompasses that of Mr. Justice Brennan in his *Trop* concurrence. In one instance, however, the judgment on legislative motivation leads to a conclusion on the punitiveness of the sanction; in the other, to a conclusion on Congress' authority to enact the sanction.

31 One additional point, however, is made on behalf of the argument of congressional authority, namely that the congressional purpose "to end a potential drain on the country's military manpower" would be sufficient to support expatriation under the war powers. 376 U.S. at 213. Arguing that Congress could use expatriation as a deterrent to bring about the constitutionally permissible end of suppressing draft evasion, Mr. Justice Stewart carried forward the theory of Mr. Justice Frankfurter's dissent in the *Trop* decision. Like the *Trop* dissent, the *Mendoza* dissent subscribes to the theory that Congress may use expatriation as it would any other sanction, the only limitation being its authority to deter the conduct made an expatriating condition.
That the same judgment is critical under diverse doctrines reflects a common concern. In the sense that it follows the pattern of Mr. Justice Brennan's argument in *Trop*, the majority's argument in *Mendoza* reflects a continuation of the debate that compelled the Court's attention in the *Trop* decision, the debate on the issue of congressional authority.

Confirmation for the thesis that the *Mendoza* court regarded the issue of congressional authority as virtually interchangeable with the issue of punishment is found in the treatment given by the majority and dissenting opinions to Mr. Justice Frankfurter's thesis in *Perez v. Brownell*. That thesis was direct and unequivocal: Congress has the authority under the foreign affairs power and the necessary and proper clause to effect the expatriation of those who vote in a foreign election. The opinion in *Perez* made no mention of punishment. Neither the government nor the appellant had addressed itself to that issue. Yet in reviewing the significance of the *Perez* decision, Mr. Justice Goldberg says:

In *Perez* the contention that Section 401(e) [expatriation by voting in a foreign election] was penal in character was impliedly rejected by the Court's holding . . . that voting in a political election in a foreign state "is regulable by Congress under its power to deal with foreign affairs."  

Reflecting the same interpretation of the *Perez* decision, the dissent regards the decision as relevant on the issue whether section 401(e) imposes punishment. Arguing that the expatriation of wartime draft evaders is not punitive, the dissent concludes:

Rather, the statute seems to me precisely the same kind of regulatory measure, rational and efficacious, which this Court upheld against similar objections in *Perez v. Brownell*.  

That both the *Mendoza* majority and dissent view *Perez* as a precedent on the issue of punishment suggests that both sides regard the debate on punishment as a medium for analyzing the issue that confronted the Court in *Perez*: the issue of congressional authority to expatriate. But if this is accurate, one is left with the bewildering question of how it could have happened: where is the basis in constitutional tradition for this peculiar use of the concept of punishment?

The beginnings of an answer are found by looking to the open reliance in the majority and dissenting *Mendoza* opinions on cases dealing with the propriety of legislation under the bill of attainder and ex post facto clauses of the Constitution. Application of these clauses requires a preliminary finding that the sanction is punitive. Under the accepted bill of

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32 376 U.S. at 164.
33 *Id.* at 210.
attainder formula, analysis is completed by finding that the punishment is imposed without a judicial trial; under the ex post facto clause, that the punishment is inflicted retroactively.

An entrancing tale is found in the way these clauses evolved into a medium for examining legislative rationality, and in the way this function carried over into other areas of constitutional debate, eventually to appear as the focal point for the plurality and dissenting opinions in Mendoza-Martinez. In the constitutional development of these seemingly unrelated clauses, we can find a perspective on the Court's use of the sixth amendment concept of punishment as a framework for examining legislative motivation and authority.

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Bill of attainder doctrine was formulated in the years between the Civil War and the evolution of the fourteenth amendment as the Supreme Court's vehicle for review of state legislation. Without the due process and equal protection clauses, the Supreme Court had little constitutional basis for an aggressive examination of state legislative authority. Yet in the wake of the Confederacy's surrender, the Supreme Court began to regard the content and rationality of state legislation as a fitting subject for evaluation by the federal judiciary. In the 1866 decision of Cummings v. Missouri\(^{34}\) a sharply divided Court embarked on the task of recasting the relation of the states to the federal judiciary. To support its holding that an amendment to the Missouri constitution conflicted with the federal constitution, the Court used the bill of attainder clause as a new tool of constitutional theory. Also the ex post facto clause appeared for the first time to have the flexibility of applying to a wide range of state legislation. For its overwhelming influence in the Court's doctrinal thinking a century later in Mendoza-Martinez, the decision in Cummings deserves detailed attention.

In 1865 the people of Missouri amended the state constitution to restrict the occupational freedom of those who had supported the cause of the Confederacy. For those who wished to teach in educational institutions, to serve as priests or engage in other specified activities, the amendment required an oath of non-involvement and non-sympathy with "armed hostility to the United States." Criminal sanctions (imprisonment and a fine) faced those like Cummings, a Catholic priest, who engaged in the proscribed activity without taking the oath. Convicted and sentenced, Cummings perfected his appeal through the state courts and, while the post-civil war amendments were still circulating for ratification, he took his challenge under the "old" constitution to the United States Supreme Court.

\(^{34}\) 71 U.S. (4 Wall.) 277 (1866).
In his opinion in support of the Court's invalidation of the Missouri test-oath, Mr. Justice Field fashioned doctrine to bridge the language of the past and the thinking of the present. There was little to draw upon but the bill of attainder and ex post facto clauses. These clauses had never before been used by the Supreme Court to justify the invalidation of state or federal legislation. The scope of the ex post facto clause had, however, been given a verbal gloss in a line of decisions rejecting its application. The concept had become identified with two elements: (1) retrospective application and (2) a criminal sanction. But from the first decision construing the clause, the term punishment had been used to characterize the requirement of a criminal sanction. Thus, with fidelity to the language of past cases, Mr. Justice Field was able to frame the issue under the ex post facto clause to be whether "the States can in effect inflict a punishment for a past act that was not punishable at the time it was committed." Under this formulation, no inquiry need be made as to the nature of the criminal process or of the criminal sanction. The term "punishment," originally used to describe criminal sanction, became an independent test for applying the ex post facto clause. With the element of retroactivity ostensibly satisfied by the oath's attaching to civil war activity, the sole question in applying the clause in *Cummings* was whether the restriction of occupational freedom was a punitive sanction.

Although the ex post facto clause had a gloss requiring its equation with punitive sanction, the bill of attainder clause had received no judicial clarification prior to 1866. To define the clause, Mr. Justice Field referred in part to acknowledged historical instances of bills of attainder. English history abounds with bills of attainder, which generally were parliamentary judgments that specified individuals suffer corruption of blood, death or banishment. Faithful to this history, Mr. Justice Field noted one critical element: the absence of judicial determination of fact. Yet he cavalierly disregarded the historical precedents in determining the added requirements for the clause's application. The *Cummings* definition for a bill of attainder, which was to

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35 Of the limitation on state legislative authority in art. I, § 10, the only other clause seemingly capable of flexible use is the clause prohibiting "law impairing the obligation of contracts." See Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). The facts in *Cummings*, however, presented not the shred of a contract.


38 71 U.S. at 319.

39 In United States v. Lovett, 328 U.S. 303 (1946), Mr. Justice Frankfurter argued that the bill of attainder clause be strictly limited to historical roots. For the difficulty of isolating the controlling historical criteria, see the illuminating Comment, 72 YALE L.J. 330 (1962).
influence all succeeding development of the clause, was cast with unfortunate disregard for the breadth of its terms:

A bill of attainder is a legislative act which inflicts punishment without a judicial trial.\(^{40}\)

In relying on the term "punishment," Mr. Justice Field correctly described, but nonetheless overshot, the historical record. For while bills of attainder inflicted punishment, this was not their only characteristic. Since the Missouri amendment of 1865 obviously satisfied the requirement that the sanction be imposed by the legislature without a judicial trial, the only matter for decision under the Field definition was whether the deprivation of occupational freedom constituted punishment.

The argument that the restriction of occupational freedom was punitive was developed by two points; one positive, the other dispelling an imagined objection. On the positive side Mr. Justice Field argued that the sanction was punitive because, as it appeared to the majority, the Missouri legislature had acted retributively toward the fellow-travelers of the Confederacy. To reach this conclusion, the majority reasoned that participation in the rebellion had no "possible relation to [the participants'] . . . fitness for those pursuits and professions [affected by the amendment]."\(^{41}\) The restriction on occupational freedom was not designed to regulate the designated occupations. Since the Court could perceive no permissible legislative purpose other than that of setting occupational qualifications, it reasoned that the Missouri test-oath had no rational purpose—that the deprivation of occupational freedom was imposed as an end in itself, as retribution, as punishment.

The second thrust of the argument dispelled the possible objection that deprivations of economic freedom could not conceptually be regarded as punishment. To prove this untrue, Mr. Justice Field gave numerous examples of similar sanctions used as sentences in formal criminal convictions.

The argument on punishment turned on an examination of legislative motivation. And the central point of this examination was the judgment—not by the legislature, but by the Court—that sympathy with the Confederacy was not a factor rationally related to suitability for the occupations restricted by the Missouri amendment. The Court’s conclusion that the restriction was visited as retributive punishment came from this judgment and the assumption that no other legislative purpose would be permissible; on the basis of this conclusion, the amendment was

\(^{40}\) 71 U.S. at 319. As it stands, the formula for the bill of attainder clause is identical with that for declaring a punitive sanction unconstitutional under the sixth amendment.

\(^{41}\) 71 U.S. at 320.
declared invalid under the ex post facto and bill of attainder clauses.

Distinguishing the formal basis of the decision from the controlling arguments, one sees in the Court's judgment the beginnings of its enduring practice of judging the reasonableness of state legislation. The practice began with the aid of ingenious judicial construction of the bill of attainder and ex post facto clauses, to be shifted in time to the due process clause of the fourteenth amendment. Through the concept of punishment, the Court was able to implement the type of value judgments on state legislation that were later to become the mainstay of due process litigation.

In cases shortly after Cummings, Mr. Justice Field's novel use of the ex post facto and bill of attainder clauses merged with analysis under the due process clause. In Dent v. West Virginia, a unanimous Court, again speaking through Mr. Justice Field, upheld a state statute requiring doctors either to have graduated from medical school or to have passed a special examination. Finding the regulation a reasonable exercise of the state's police power, the Court phrased its doctrinal conclusion both under the due process clause and under the bill of attainder clause. On the issue of due process, it was enough to say that the regulation was not arbitrary. On the bill of attainder clause, the Court was satisfied to distinguish Cummings on the ground that in Dent that state had enacted a valid qualification.

The ex post facto rationale of Cummings merged with due process analysis in Hawker v. New York, just as the bill of attainder rationale had in Dent. Though split six to three, the Court upheld the retroactive application of a New York statute barring convicted felons from the practice of medicine. The theory of the majority was straightforward: the restriction was a reasonable exercise of the state's power to regulate the practice of medicine. Under the due process clause, the Court could use its judgment on the reasonableness of the state statute as the ultimate basis for decision; there was no longer a need for a detour through the concept of punishment. With the due process clause supplanting their Cummings function, the bill of attainder and ex post facto clauses ceased to be used by the Court as techniques for invalidating legislation not felt to relate rationally to an acceptable legislative purpose.

42 129 U.S. 114 (1889).
43 170 U.S. 189 (1898).
44 The bill of attainder clauses were used as vehicles for examining legislative rationality in two other test-oath cases: Ex parte Garland, 71 U.S. (4 Wall.) 333 (1865) (companion case to Cummings) and Pierce v. Carskadon, 83 U.S. (16 Wall.) 234 (1872). Since the post civil war test oath cases, all invocations of the bill of attainder clause, except for the literalist application in United States v. Lovett, 328 U.S. 303 (1946), have been rejected. See the complete list of cases rejecting application of the clause in Comment, 72 YALE L.J. 330, 335 n.46 (1962).
Although the *Cummings* approach to the bill of attainder clause has lost its function to due process analysis, the concept of punishment developed by Mr. Justice Field has continued to have vast appeal. Punishment, according to *Cummings*, is retribution, the absence of a rational, acceptable legislative purpose. Looking to legislative motivation is a seemingly easier guide to whether a sanction is punitive than estimation of the quantitative seriousness of the sanction. Thus, the argument has frequently appeared that a money sanction is not punitive because the legislature had the purpose of providing compensation: with a purpose of compensation, the sanction is not retributive and thus not punitive.45

Although the legislative intent argument has been used several times in Supreme Court opinions to support the conclusion that a sanction was not punitive, not until the 1956 expatriation cases was the *Cummings* argument re-employed to invalidate legislation under a constitutional concept of punishment. Writing for the plurality in *Trop v. Dulles*, Chief Justice Warren relied exclusively on the theory of *Cummings* and the subsequent bill of attainder cases to sustain the conclusion that the sanction was punitive and thus potentially invalid as cruel and unusual punishment. The use of the argument so established, the Court invoked the bill of attainder tradition again in *Mendoza-Martinez*, this time to reason that expatriation was punitive and thus tantamount to a criminal prosecution.

The bill of attainder clause, as it functions in *Cummings*, and the eighth amendment, as it was applied in *Trop*, each provide a medium for analysis and judgment on the issue of congressional authority to enact a particular sanction. This synonymity of purpose permits breeding the *Cummings* approach to punishment with the doctrine of cruel and unusual punishments. But the gulf between the bill of attainder clause and the sixth amendment is not so easily bridged. The former focuses on the scope of legislative competence, the latter on the requirements of procedure. Each has its domain. Questions of procedural adequacy arise only on the assumption that Congress has the authority to enact a sanction. One clause is concerned with the question whether, the other, with the question how. Transferring criteria for punishment from one clause to the other produces strange results. It produced the result in *Mendoza-Martinez* of a decision formally based on the sixth amendment, but whose rationale bespeaks a concern for the issue of congressional authority.

45 See, e.g., Rex Trailer Co. v. United States, 350 U.S. 148 (1956); United States *ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). In these cases the issue of punishment arose under the double jeopardy clause.
Before, the Court had only the issue of congressional authority to trouble it in expatriation cases. Now it carries in its repertoire of five-to-four precedents on expatriation a unique decision on the sixth amendment—a decision which for the first time acknowledges the application of the sixth amendment to a sanction other than imprisonment, torture and death, but which nonetheless bespeaks more concern for legislative motivation than for the protection of the individual accused. *Mendoza-Martinez* is old wine bottled anew: it expresses an old dispute in a doctrinal innovation. As a hybrid of doctrine on one plane and concern on another, it neither foretells new doctrine nor resolves the old concerns. Because the decision is rooted in a conflict on the scope of congressional authority, it is hardly a reliable harbinger of expansion of the sixth amendment. It forestalls, but does not satisfy the need for a new synthesis and a new majority position on the authority of Congress to use expatriation as a sanction.